Supreme Court, U.S.
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No. 05-8820

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully Submitted,

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CAPITAL CASE – QUESTIONS PRESENTED (restated)

1. Whether, under 28 U.S.C. § 2244(d)(2), a state prisoner is entitled to tolling of the one-year limitation period during the time that a petition for writ of certiorari is pending following completion of collateral proceedings in the state court?

2. Whether equitable tolling of the one-year limitation period under 28 U.S.C. § 2244(d) is available where the law of the circuit unequivocally excludes tolling of the ninety-day period in which a petition for writ of certiorari could have been filed following affirmance of the denial of state collateral relief?

3. Whether equitable tolling is available based upon: actions of state-appointed collateral counsel, petitioner's low intelligence, imposition of a death sentence, or the merits of the underlying constitutional claims raised in the habeas petition?

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A. The Eleventh Circuit did not decide whether the tolling provision under 28 U.S.C. § 2244(d)(2) included the time in which a state prisoner could seek a writ of certiorari following the state court's affirmance denying state collateral relief, holding instead that a certificate of appealability should not have issued upon the claim. Even if the issue as raised may properly be considered for certiorari review, the time period is not subject to tolling under § 2244(d)(2), as the tolling provision exists to permit exhaustion of state court remedies and certiorari review from state collateral proceedings is not required to satisfy § 2254(b) 5

B. Petitioner's argument that a contrary circuit court decision provides a basis for equitable tolling -- notwithstanding unequivocal circuit precedent excluding the ninety-day period in which a petition for writ of certiorari may be filed following the state court's affirming the denial of state collateral relief -- was not presented below and thus is not subject to certiorari review. Even if reviewable and assuming that equitable tolling is available under 28 U.S.C. § 2244(d), a habeas petitioner's failure to follow circuit precedent does not constitute an extraordinary circumstance warranting equitable relief 8

C. Assuming equitable tolling is available under 28 U.S.C. § 2244(d), appointed collateral counsel's mistaken advice concerning the statute of limitations and petitioner's low intelligence do not provide proper bases for applying equitable tolling. Petitioner's reliance upon the

imposition of the death penalty and the merits of the underlying constitutional claims were not before the circuit court of appeals in considering the applicability of equitable tolling, and thus do not provide a basis for certiorari review. And even if reviewable, the same is true as to those reasons advanced for equitable tolling 10

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No. 05-8820

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LAWRENCE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINION BELOW

Petitioner, Gary Lawrence, seeks review of the August 26, 2005 opinion of the United States Court of Appeals for the Eleventh Circuit affirming the judgment dismissing petitioner's habeas petition as time-barred, reported at Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005). Petitioner did not seek rehearing or rehearing en banc from the Eleventh Circuit.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1). Although this is the appropriate provision, the requirements for granting certiorari review, as discussed, infra, have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts as accurate petitioner's statement regarding the statutory provision implicated in this case.

STATEMENT OF THE CASE AND FACTS

Petitioner, Gary Lawrence, was convicted of one count of murder in the first degree, § 921.141, Fla. Stat., as well as one count each of conspiracy to commit murder, petit theft, and grand theft of a motor vehicle, obtained in the Circuit Court of Santa Rosa County, Florida. Petitioner received a sentence of death for the murder conviction. Petitioner filed a direct appeal, upon which the Florida Supreme Court affirmed his judgment of conviction and sentence on August 28, 1997. Lawrence v. State, 698 So. 2d 1219, 1220 (1997), cert. denied, 522 U.S. 1080 (1998). The facts underlying petitioner's offenses are summarized in that opinion. Id. at 1220-1221.

Petitioner subsequently sought state postconviction relief on January 19, 1999, which was denied on October 11, 2000. The state supreme court affirmed that denial on October 17, 2002. Lawrence v. State, 831 So. 2d 121 (Fla. 2002), cert. denied, 538 U.S. 926 (2003).

Petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 11, 2003. An amended petition was filed on petitioner's behalf by appointed counsel on September 8, 2003. Respondent filed its "Response To Order To Show Cause Why A Writ Of Habeas Corpus Should Not Be Granted" on January 12, 2004, asserting that the case should be dismissed as petitioner was time-barred pursuant to 28 U.S.C. § 2244(d) from obtaining federal habeas relief upon either the petition or amended petition, and that he was not entitled to equitable

tolling.[1] Petitioner, on March 30, 2004, filed his reply to the State's response, opposing the dismissal of his petition.

In an Order dated April 12, 2004, the district court stayed the proceedings pending the disposition of a petition for writ of certiorari in the United States Supreme Court in "*Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079)." The State's request that the Order be vacated was denied on April 21, 2004. Thereafter, the State sought to appeal from the stay order on May 5, 2004; on September 2, 2004, the Eleventh Circuit Court of Appeals, in Lawrence v. State, No. 04-12348-P, dismissed the State's appeal for lack of jurisdiction. The district court subsequently dismissed the habeas petition as untimely on September 16, 2004, as this Court had denied certiorari review in Caruso v. Abela, 541 U.S. 1070 (2004).

Petitioner filed his notice of appeal to the Eleventh Circuit on October 15, 2004. The district court granted a certificate of appealability as to

> whether the one-year limitation period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. See 28 U.S.C. § 2244(d)(2). . . .

Appendix, Document D, at 4 (internal quotation omitted and additional citations omitted). On appeal, the Eleventh Circuit first concluded that a certificate of appealability should not have been issued on the statute of limitations issue. Lawrence, 421 F.3d at 1225. The lower court thereupon

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[1]According to Respondent's consideration of § 2244(d), the petition was due on November 19, 2002, or one day following the Florida Supreme Court's mandate affirming the denial of postconviction relief, as petitioner's conviction became final for purposes of 28 U.S.C. § 2244(d) on January 20, 1998, when this Court denied his petition for writ of certiorari, and excluding the time that his postconviction relief motion was pending -- from January 19, 1999 to November 18, 2002. The habeas petition filed on March 11, 2003, accordingly, was nearly four months late.

held that equitable tolling was neither warranted based upon conduct of counsel provided by the state nor where petitioner had an IQ of 81 and he did not allege that he was mentally incompetent and thereby incapable of complying with § 2244(d).

Respondent does not dispute that part of petitioner's contentions in his third question presented were properly raised before the Eleventh Circuit, limited to whether collateral counsel's conduct and petitioner's IQ provided a basis for equitable tolling, but disputes that Questions One, Two, and the remaining bases relied upon in Question Three are subject to review.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit did not reach the issue whether the tolling provision under 28 U.S.C. § 2244(d)(2) includes the time in which a state prisoner may seek a writ of certiorari following the state court's affirmance denying state collateral relief, holding instead that a certificate of appealability should not have issued on the claim. Even if the issue is subject to certiorari review, the time in which certiorari can be sought from the denial of state postconviction relief is not subject to tolling under § 2244(d)(2), which exists for the purpose of permitting exhaustion of state court remedies and certiorari review from state collateral proceedings is not required to satisfy § 2254(b).

Petitioner contends that certiorari review is warranted as to the issue whether the time for which a petition for writ of certiorari from state collateral proceeding is pending is included under 28 U.S.C. § 2244(d)(2), citing the conflicting decision of the Sixth Circuit Court of Appeals in Abela v. Martin, 348 F.3d 164 (6th Cir. 2003), cert. denied, 541 U.S. 1070 (2004). Pet. at 7-8.

First, petitioner neglects to address the fact that the court below did not consider this issue, holding instead that a certificate of appealability should not have been granted thereupon because the requirements under 28 U.S.C. § 2253(c)(2) had not been met. See Lawrence, 421 F.3d at 1225 ("The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue.... On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.") (quoting Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001)). Accordingly, the Eleventh Circuit only considered "whether a State impediment or equitable tolling excepts the one-year filing deadline." Lawrence, 421 F.3d at 1225-1226. Thus the underlying issue is not properly before this Court, and petitioner has not challenge the lower court's determination concerning the propriety of issuance of the certificate of appealability. Compare Miller-El v.

Cockrell, 537 U.S. 322, 326-327 (2003) (addressing issue as to whether certificate of appealability was erroneously denied).

Even if the underlying issue is properly before the Court -- i.e., whether § 2244(d)(2) includes the time period in which a petition for writ of certiorari from the denial of state collateral relief is pending -- certiorari should not issue.

Pursuant to § 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." In Carey v. Safford, 536 U.S. 214 (2002), this Court held that "an application is pending as long as the ordinary *state collateral review process* is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution *through the State's post-conviction procedures*, by definition it remains 'pending.'" Id. at 219-220 (emphasis added). Tolling under § 2244(d)(2) serves the purpose of permitting a state prisoner to exhaust his state court remedies, a requirement under § 2254(b). Exhaustion does not, however, require that a state prisoner seek discretionary review from this Court. In comparison, relative to the direct appeal of the judgment of a conviction and sentence, the time that a petition for certiorari is pending or the ninety-day period for seeking such review is relevant under § 2244(d) because it determines when a conviction and/or sentence becomes final. Caspari v. Bohlen, 510 U.S. 383, 390 (1994).[2] The Eleventh Circuit's case law is consistent with those principles, Coates, 211 F.3d at 1227, as are nearly all of the other circuit courts of appeals. See, e.g., Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 542 (3rd Cir.), cert.

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[2]Such consideration obviously is pertinent to the issue of retroactivity. Teague v. Lane, 489 U.S. 288, 311 (1989).

denied, 534 U.S. 959 (2001); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson, 192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035-1036 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000). The fact that the Sixth Circuit reached a different result, compare Abela, 348 F.3d at 172-173, does not provide a basis for granting certiorari review in this case -- particularly when the merits of the issue were not properly before the Eleventh Circuit and that that court recognized as much in stating that a certificate of appealability should not have issued on the issue. Lawrence, 421 F.3d at 1225. Thus petitioner's discussion of the merits of the claim, then, including the reasoning of the various courts of appeals that have addressed the issue, see Pet. at 7-13, is simply an invitation for this Court to render an advisory opinion.[3]

Based upon the foregoing discussion, the Court should not exercise its jurisdiction to consider this issue now raised for the first time. See Schiro v. Farley, 510 U.S. 222, 228 (2001) (the Court "ordinarily do[es] not review claims made for the first time in this Court . . . ."); Heath v. Alabama, 474 U.S. 82, 87 (1985); Berkemer v. McCarty, 468 U.S. 420, 443 (1984). In addition, certiorari is not warranted. Rules of the Supreme Court of the United States, Rule 10.

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[3]Moreover, because petitioner filed his federal habeas petition on March 11, 2003 -- prior to this Court's disposition on March 24, 2003 of his petition for writ of certiorari from the Florida Supreme Court's opinion affirming the denial of postconviction relief -- one must question the basis for any purported reliance by petitioner on § 2244(d)(2).

B. Petitioner's argument that a contrary circuit court decision provides a basis for equitable tolling -- notwithstanding unequivocal circuit precedent excluding the ninety-day period in which a petition for writ of certiorari may be filed following the state court's affirming the denial of state collateral relief -- was not presented below and thus is not subject to certiorari review. Even if reviewable and assuming that equitable tolling is available under 28 U.S.C. § 2244(d), a habeas petitioner's failure to follow circuit precedent does not constitute an extraordinary circumstance warranting equitable relief.

Petitioner contends that certiorari review is warranted as to the issue whether equitable tolling is available under § 2244(d)(2) based upon a so-called "lack of clarity in the relevant law" and his unsupported conclusory belief that his "strategic choices regarding Section 2244(d)(2) statute of limitations period were reasonable . . . ." Pet. at 14.[4]

In essence, petitioner urges this Court to consider his claim that equitable tolling should preclude the running of the limitation period for federal habeas corpus review when a state prisoner relies upon an out-of-circuit appellate decision in determining when the petition is due, notwithstanding governing circuit precedent that is to the contrary. Pet. at 14-15. Petitioner fails, however, to address the fact that that precise issue was neither presented to nor decided by the Eleventh Circuit. Compare Lawrence, 421 F.3d at 1226 (". . . Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. . . . Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling.").

In addition, while petitioner contends that he was diligent, he makes no effort to demonstrate or otherwise explain his failure to follow governing case law, instead relying upon an alleged split

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[4]As referenced supra, at 7 n.3, one must question petitioner's assertion that he made a strategic choice as to when to file his habeas petition due to conflicting case law, given the fact that he filed that petition prior to this Court's disposition of the request for certiorari review from the state collateral proceedings.

in the circuits. See Pet. at 7-8, 14-15. Even if reviewable, petitioner's claim for equitable tolling must fail, as the alleged split did not exist at the time that his federal habeas petition was due on November 19, 2002. Indeed, Abela was not even argued until March 26, 2003, and in being decided on October 22, 2003, was nearly seven months after petitioner untimely filed his habeas petition on March 11, 2003. Thus at the time his petition was due, every circuit that had considered the issue -- including the Sixth Circuit -- had held in accord with the proposition that the ninety-day period to seek certiorari review from a state collateral proceeding was not tolled under § 2244(d)(2). See, e.g., Stokes, 247 F.3d at 542; Crawley, 257 F.3d at 398-401; Ott, 192 F.3d at 512-513; Isham v. Randle, 226 F.3d 691, 695 (6th Cir.), cert. denied, 531 U.S. 1201 (2001); Gutierrez, 233 F.3d at 491-492; Snow, 238 F.3d at 1035-1036; Rhine, 182 F.3d at 1155-1156.

Based upon the foregoing discussion, the Court should not exercise its jurisdiction to consider this issue now raised for the first time. See Schiro, 510 U.S. at 228; Heath, 474 U.S. at 87; Berkemer, 468 U.S. at 443. Moreover, certiorari is not warranted under Rule 10 of the Rules of the Supreme Court of the United States.

C. Assuming equitable tolling is available under 28 U.S.C. § 2244(d), appointed collateral counsel's mistaken advice concerning the statute of limitations and petitioner's low intelligence do not provide proper bases for applying equitable tolling. Petitioner's reliance upon the imposition of the death penalty and the merits of the underlying constitutional claims were not before the circuit court of appeals in considering the applicability of equitable tolling, and thus do not provide a basis for certiorari review. And even if reviewable, the same is true as to those reasons advanced for application of equitable tolling.

Finally, petitioner argues that as the result of state collateral counsel's mistaken advice, his own low intelligence[5], the fact that he was sentenced to death, and the merits of the underlying constitutional claim, equitable tolling should excuse his untimely habeas petition. Pet. at 16.

Petitioner's reliance upon collateral counsel's conduct in seeking to avail himself of equitable relief fails to acknowledge or otherwise recognize that Congress expressly precluded relief premised upon the conduct of postconviction or collateral counsel. 28 U.S.C. § 2254(i). That provision does not contain an exception for invoking collateral counsel's conduct to excuse an untimely petition. Nor did petitioner make any attempt below to demonstrate that appointed counsel precluded him from ascertaining the date which his petition was due. Petitioner also fails to point to any circuit courts of appeals' decision that treats an attorney's mistaken advice as an extraordinary circumstance excusing an untimely habeas petition. To the contrary, the circuits are in accord that such does not constitute an extraordinary circumstance. See, e.g., Smaldone v. Senkowski, 273 F.3d 133, 138-139 (2nd Cir. 2001), cert. denied, 535 U.S. 1017 (2002); Johnson v. Hendricks, 314 F.3d 159, 162-163 (3rd Cir. 2002), cert. denied, 538 U.S. 1022 (2003); Harris v. Hutchinson, 209 F.3d 325, 330-331 (4th Cir. 2000); Jurado v. Burt, 337 F.3d 638, 644-645 (6th Cir. 2003); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S.

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[5]Petitioner has repeatedly referred to himself, in this Court and below, as "nearly retarded." See, e.g., Pet. at 16. As the record bears out, however, petitioner has an IQ of 81.

863 (2001); Miranda v. Castro, 292 F.3d 1063, 1067-1068 (9th Cir.), cert. denied, 537 U.S. 1003 (2002); Helton v. Secr. for the Dept. of Corrections, 259 F.3d 1310, 1313 (11th Cir. 2001), cert. denied, 535 U.S. 1080 (2002).

Next, petitioner relies upon his low intelligence as a basis for equitable tolling. Petitioner did not assert and thereupon establish that mental incapacity rendered him incapable of timely filing the petition, and without more, no court has applied the rule petitioner seeks. See, e.g., Green v. Hinsley, 116 Fed. Appx. 749, 751 (7th Cir. 2004) (unpublished).

Petitioner also urges this Court to accept certiorari review on the basis that he is under a sentence of death. Pet. at 15. The Eleventh Circuit did not address this argument, as it was not presented below. In any event, petitioner's "death is different" argument ignores the fact that Congress did not make an exception to the limitation period in death cases and is contrary to the very purpose behind the enactment of AEDPA -- i.e., to curtail the endless delay in capital cases. Indeed, the statutory scheme itself evinces such intent: in cases where a state has opted in under 28 U.S.C. § 2261, the limitation period is sixth months in length, and similarly does not include a provision for equitable tolling. And the circuit courts of appeal that have considered the application of § 2244(d) in capital cases have rejected the notion that equitable tolling should be evaluated more leniently where a sentence of death has been imposed as compared to a term of years. See e.g., Rouse v. Lee, 339 F.3d 238, 253-256 (4th Cir. 2003) (en banc); Fierro v. Cockrell, 294 F.3d 674, 684 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003); Johnson v. McBride, 381 F.3d 587, 590-591 (7th Cir. 2004), cert. denied, 125 S.Ct. 1649 (2005); see also Kreutzer, 231 F.3d at 463 (no special consideration applied in capital case); but see Fahy v. Horn, 240 F.3d 239, 245 (3rd Cir.) (allowing less than "'extraordinary circumstances' to trigger equitable tolling of the AEDPA's statute of

limitations *when a petitioner has been diligent* in asserting his or her claims and rigid application of the statute would be unfair."in capital cases,") (emphasis added), cert. denied, 534 U.S. 944 (2001). Petitioner's reliance upon Fahy is not well taken, see Pet. at 13-15, as he neglects to address the fact that here petitioner did not act reasonably or with due diligence in light of the governing circuit precedent that unequivocally rejected the ninety-day period for which certiorari could be sought from the denial of relief in a state postconviction proceeding as subject to tolling under § 2244(d)(2). Compare Fahy, 240 F.3d at 244, 245 ("Fahy delayed filing his federal habeas petition because he believed he was required to pursue a fourth petition for collateral relief in state court. At the time Fahy made this ill-advised choice, he reasonably believed that the state petition was properly filed. The Pennsylvania Supreme Court eventually disagreed, but the filing period for Fahy's federal habeas petition had run by the time the Court ruled."; "[A]t the time Fahy filed his fourth PCRA petition Pennsylvania law was unclear on the operation of the new PCRA time limit. . . . If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner. Fahy's misjudgment, therefore, was reasonable.").

Finally, petitioner contends that this Court should consider "the potential merits of the substantive claim barred under a statute of limitations." Pet. at 15; id. at 16. While petitioner contends that "other courts" have looked to the underlying claim in deciding whether to excuse an untimely petition, Pet. at 15-16, he relies upon inapposite case law. In respect to his citation to Drew v. Dept. of Corrections, 297 F.3d 1278 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003), as petitioner acknowledges, Pet. at 15, he relies upon, quoting, a dissenting opinion. See Drew, 297 F.3d at 1294. Nor is Justice v. United States, 6 F.3d 1474 (11th Cir. 1993), see Pet. at 16 n.15, on

point. There, application of a statute of limitations arose in a case brought under the Public Vessels Act, 46 U.S.C.App. §§ 781-90 (1988) (PVA) and the Suits in Admiralty Act, 46 U.S.C.App. §§ 741-52 (1988) (SAA). Obviously, proceedings brought under 28 U.S.C. § 2254, where a state prisoner is challenging the constitutionality of his state judgment of conviction and sentence, implicate completely different interests than when a civil suit is brought in the first instance. Moreover, Justice does not stand for the proposition urged by petitioner. Compare id., 6 F.3d at 1479 ("[C]ourts, acting in their equitable capacity, will toll statutes of limitations, but 'only upon finding an inequitable event that prevented plaintiff's timely action.'"). In Murray v. Carrier, 477 U.S. 478 (1986), also relied upon by petitioner, see Pet. at 16 n.15, this Court considered what constituted "cause" upon which a federal district court, with the proper showing of prejudice, could thereupon reach the merits of a constitutional claim raised in a habeas petition that was procedurally defaulted in state court. Id. at 481-482. While petitioner cites Justice Stevens' concurrence in Murray, he fails to recognize that not only is that a pre-AEDPA case -- i.e., before the enactment of a statute of limitations in habeas actions -- but also that this Court did not then and has not since, adopted the rule that a procedural basis for denying habeas relief is subject to merits' consideration. The same is true concerning petitioner's citation to Hensley v. Municipal Court, 411 U.S. 345 (1973). See Pet. at 16 n.15.

Based upon the foregoing discussion, certiorari is not warranted under Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny petitioner's request for certiorari review.

Respectfully Submitted,

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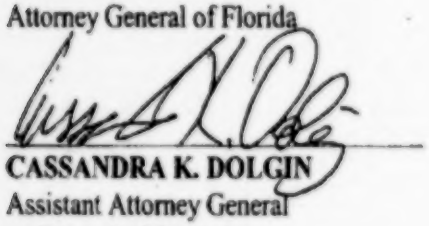
Attorney General of Florida



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